90-1235

Supreme Court, U.S.
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No. _____

in the

Supreme Court of the United States

Jet Charter Service, Inc.,

Petitioner

vs.

Banque Paribas (Suisse), S.A.,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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QUESTION PRESENTED

Whether exercise of in personam jurisdiction over a Swiss bank would violate constitutional due process where bank breached its promise made by bank's officer, who was physically present in Florida, to deliver in Florida to the seller of two jet aircraft, that were then sold at the closing in Florida, a letter of credit in seller's favor for presentment and payment in Florida.

PARTIES

In the Eleventh Circuit:

Jet Charter Service, Inc. - Plaintiff-Appellant

Banque Paribas (Suisse) S.A. - Defendant-Appellee

In the District Court:

Additional defendants who were dismissed prior to appeal.

W. Koeck
Progress Aviation (U.S.A.), Inc.
Progress Aviation, S.A.
Jean Caillet

Banque Paribas (Suisse) S.A. is owned by a bank holding corporation, Compagnie Financiere de Paribas.

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OPINIONS BELOW

The decision of the United States Court of Appeal for the Eleventh Circuit is reported at 907 F.2d 1110 (11th Cir. 1990). The Eleventh Circuit opinion set out in the Appendix, infra. The District Court's opinion is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on August 3, 1990. The timely Petition for Rehearing was denied on October 31, 1990. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 14th Amendment to the Constitution of the United States and provisions of the Florida long arm statutes, § 48.193(1)(a), (b), (f) and (g), Florida Statutes, are set out in the Appendix, infra.

STATEMENT OF THE CASE

Petitioner, Jet Charter, instituted a diversity action under 28 U.S.C. § 1332 against Respondent, Banque Paribas (Suisse) S.A. and certain other defendants who were dismissed in the district court prior to the appeal to the Eleventh Circuit. The district court had granted the Swiss bank's motion to dismiss for lack of jurisdiction under the Florida Long Arm Statute. The Eleventh Circuit affirmed holding ". . . the requirements of due process are not met for the purposes of asserting personal jurisdiction over Paribas in Florida courts." (App. 11).

The suit arose out of a sale in Florida of two jet aircraft for $26,473,500 which was being financed by the purchaser through the Swiss Bank. The dispute arose at closing over the terms and conditions of an amended letter

of credit for $1,800,000 that was to be delivered to the seller. The key facts on jurisdiction are succinctly summarized by the Eleventh Circuit's opinion:

> On the day of closing, defendant Jean Caillet, an officer of defendant Paribas, attended the closing in Miami, Florida. When Jet Charter asked whether the letter of credit had been opened, Caillet produced a letter purporting to confirm "the opening of an irrevocable Letter of Credit in the amount of US $1,800,000 . . . in accordance with the terms of the Restated Purchase Agreement of 13th November 1985 between Jet Charter Services, Inc. and Progress Aviation S.A., as amended by the first amendment thereto." R5-129, Exh. B. Jet Charter was not satisfied with this letter, and asked that another letter be drafted by Caillet. Caillet obliged by drafting a letter that represented that Paribas had opened an irrevocable letter of credit in the amount of U.S. $1,800,000 in favor of Jet Charter, that an amended letter of credit would be delivered to Jet Charter in Miami, Florida by 5:00 p.m. EST on November 26, 1985 and that the letter of credit would be payable upon presentation to "Banque Paribas in Miami, Florida." The letter further represented that the letter of credit would "be a clean letter of credit other than specifically reciting terms and conditions from that certain restated amended purchase agreement of November 13, 1985 between Jet Charter Services, Inc. and Progress Aviation S.A. as amended by the first amendment thereto." R5-129, Exh. C.
>
> On the basis of these assurances, Jet Charter assigned its interest in the aircraft to Progress. The aircraft were delivered to Progress as anticipated in the purchase agreement, and a letter of credit was issued, although Jet Charter rejected it as not conforming to the terms of the purchase agreement. (App. 2-3)

As noted by the court's opinion, Jet Charter had filed an evidentiary affidavit detailing the relationship between the bank, the forum state, and itself as seller. Included in the affidavit were the two November 21, 1985 letters signed by the Swiss Bank. The second November 21 letter drafted at seller's request and signed by Bank's officer at the closing in Florida and addressed to Jet Charter expressly provided:

> This will confirm attached hereto is a copy of a letter dated November 21, 1985 wherein we, Paribas Suisse S.A. have opened an irrevocable letter of credit in the amount of U.S. $1,800,000 in your favor. We hereby agreed to deliver an amended letter of credit to you in Miami, Florida U.S.A., no later than by 5:00 p.m. eastern standard time on Tuesday, November 26, 1985.
>
> This amended letter of credit will be an irrevocable letter of credit payable upon presentation to Banque Paribas in Miami, Florida. Said amended letter of credit will be a clean letter of credit other than specifically reciting terms and conditions from that certain restated amended purchase agreement of November 13, 1985 between Jet Charter Services, Inc. and Progress Aviation S.A. as amended by the first amendment thereto.

As set forth in the Complaint and Jet Charter's affidavit in support of jurisdiction, the letter of credit that was issued after the closing and delivery of the planes to the buyer varied materially from what had been agreed upon, including that the letter was payable only at the bank's office in Switzerland instead of Miami, Florida and was conditional upon the unilateral approval of the buyer without any right of the seller to contest charges against the letter. Based upon the action and conduct of the Swiss Bank in Florida, the seller, Jet Charter, has sought redress in Florida for the wrongs and damages incurred. This

Petition for Writ of Certiorari is timely filed on the 29th day of January 1991.

REASONS WHY WRIT SHOULD BE GRANTED

The holding below conflicts with decision by this Court, other courts of appeal, and state courts concerning the constitutional minimum contacts necessary for state long arm jurisdiction.

The Eleventh Circuit found jurisdiction over the Swiss Bank would violate constitutional due process provisions notwithstanding that the Swiss Bank a) was financing a 26 million dollar sale of United States registered aircraft that was to close in Florida b) had expressly promised in Florida that it would deliver an amended letter of credit in Florida for payment and presentment in Florida in favor of the Florida seller and c) had further promised in Florida that it would deliver the amended letter within five days after the closing of the sale. If jurisdiction over the Swiss Bank does not constitutionally exist under these circumstances, it would be difficult to conjure a situation in which a foreign bank ever could be accountable concerning a letter of credit for a breach of a promise made in one of the states of the United States and to be performed in such state.

This case does not involve an attempt to adjudicate a cause of action that did not arise out of the defendant's purposeful acts in the forum state as was true in Perkins v. Beagut Consolidated Mining Company, 342 U.S. 437 (upholding jurisdiction) and Helicopteros Nacionales De Columbia, S.A. v. Hall, 466 U.S. 408 (denying jurisdiction).[1] The constitutional test that should be

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[1] For an interesting discussion of general and specific jurisdictions, See Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610 (1988). See also

applied at bar is the minimum contact standing of traditional notions of fair play and justice emanating from International Shoe Co. v. Washington, 326 U.S. 310, McGee v. International Life Insurance Co., 355 U.S. 220 and their progeny including Asahi Metal Industry v. Superior Court, 480 U.S. 102.

Instead of discussing Asahi, the Eleventh Circuit opted to be guided by Burger King Corp. v. Rudzewicz, 471 U.S. 462, that used the substantial connections between the Ohio franchisee and the Florida franchisor to uphold a reasonableness of a Florida forum selection clause over conduct by the franchisee that initially arose in Ohio. The Eleventh Circuit then distinguished Burger King on its facts without performing the proper constitutional tests. Under Asahi, "power" over the Swiss bank would exist under either the test expressed by Justice O'Connor's or Justice Brennan's opinions because the Swiss bank was purposely engaging in a business transaction in Florida. The reasonableness would be viewed from balancing the interests of the plaintiff, defendant, and the interests of the forum state in adjudicating the rights and interests involved. Considering that the Swiss bank was involved in a multi-million dollar transaction and had promised in Florida to deliver in Florida a letter of credit payable in Florida, it would not be constitutionally unreasonable under this Court's holdings to sue the bank in Florida for its failure to comply with its promise.

The test adduced by the Eleventh Circuit required a "long term" relationship between the Florida seller and the Swiss bank which, of course, is lacking:

> . . . We find that Paribas's brief, non-essential contact with Florida soil, coupled with its

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Brilmayer, Related Contacts and Personal Jurisdiction, 101 Harv. L. Rev. 1444 (1988); Twitchell, A Rejoinder to Professor Brilmayer 101 Harv. L. Rev 1465 (1988).

> involvement in a sales transaction initiated by a third-party, a Swiss company, in which it made no long term contractual commitments to the Florida seller, are insufficient to indicate to Paribas that it should expect to be haled into Florida's courts over disputes that arise out of the sales transaction. (App. 9) (Emphasis added)

This "long term" requirement has never been proclaimed by this Court as the litmus test for personal jurisdiction. A breach of a short term obligation can have just as a devastating effect in the forum state as that of a long term contract. Jet Charter closed the sale and delivered the jet aircraft because the bank promised on November 21, 1985 to deliver the amended letter of credit by March 26, 1985. That the Swiss bank was looking after its long term service customer (the buyer) is self-evident. That, however, does not constitutionally preclude suit in Florida by the seller, Jet Charter, for violation of the bank's promises to Jet Charter.

Under the analysis used by the Eleventh Circuit in this case, no jurisdiction would exist in McGee - a ruling by this Court has never been overruled nor discredited. Relying upon McGee, the Colorado Supreme Court in Van Schaach and Co. v. District Court, 189 Colo. 145, 538 P.2d 425 (1975), upheld jurisdiction over a Kansas Bank for revoking a letter of credit it had issued to a Colorado resident for the express purpose to extend a contract for the purchase of real property in Colorado.

Notwithstanding that Jet Charter was not contending that a bank that issued a letter was subject to jurisdiction in any state or country to which the holder of the letter of credit traveled, the Eleventh Circuit relied on such inapposite cases. Neither Leney v. Plum Grove Bank, 670 F.2d 878,881 (10th Cir. 1981) or Froning & Deppe, Inc. v. Cont Illinois Nat'l Bank & Trust Co., 695 F.2d 289, 292 (7th Cir. 1982) involved an action to deliver a

letter of credit in favor of the forum's resident for payment and presentment in the forum state. In those cases, unlike this proceeding, there was no commitment made by the bank to do anything in the forum state.

The Florida Supreme Court has recognized a single tortious act done by a defendant in Florida can be sufficient to constitutionally uphold jurisdiction. Godfrey v. Neuman, 373 So.2d 920 (Fla. 1979). In Harris v. Caribank, 536 So.2d 394 (Fla. 4th DCA 1989) jurisdiction was upheld over an out of state guarantor to a loan agreement to be repaid in Florida involving Florida realty.

In addition to the significant constitutional issues, this case is particularly important because it involves the circumstance under which jurisdiction can be obtained over a foreign bank concerning the issuance of a letter of credit. Not only is the letter of credit one of the principal financing documents used in international transaction, there is substantial usage in the United States of letters of credit that were issued by foreign banks. Air Service Exportacav v. Banco Bamerindus Du Brazil, S.A. et al., (90-7955, 90-7985 2d Cir. December 20, 1990) "Commercial letters of credit have facilitated the operation of international commerce over the centuries." Eabin v. Continental Illinois Nat'l Bank & Trust Co., 875 F.2d 114, 116 (7th Cir. 1989). "Letters of credit are designed to avoid complex disputes about how much the beneficiary really owes." The promise and premise are "pay now, argue later." If a foreign bank can constitutionally avoid jurisdiction for failure to perform promises concerning the issues, conditions and delivery of a letter of credit in a state knowing it is to be used in the state as a part of a local sales transaction, then commercial usage of letter of credit in financial transactions will have to be re-examined.

If the Swiss bank had delivered the letter of credit under the terms and conditions as promised, there would have been no need for this lawsuit. Subjecting the Bank

to jurisdiction in this case is likely to induce performance in other transactions and reduce the need for invoking a court's power.

CONCLUSION

The holding below conflicts with rulings of this Court and other federal and state court cases that have applied the jurisdiction tests mandated by this Court. Certiorari should be granted.

Respectfully submitted,

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JET CHARTER SERVICE, INC.,

Plaintiff-Appellant,

vs.

W. KOECK, Progress Aviation (U.S.A.), Inc., Progress Aviation, S.A., Jean Caillet, Defendants, Banque Paribas (Suisse), S.A.,

Defendant-Appellee

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
907 F.2d 1110
August 3, 1990

SUBSEQUENT HISTORY: Rehearing En Banc Denied October 31, 1990

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Florida. No. 86-1546-CIV-LCN; Nesbitt, Judge.

COUNSEL: For Jet Charter, Inc. Stanley J. Bartel, Miami, Florida.

For BANQUE PARIBAS: David S. Patterson, BREED, ABBOTT & MORGAN, New York, New York.

JUDGES: Clark, Circuit Judge, Morgan and Roney, *Senior Circuit Judges.

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

[*1111] CLARK, Circuit Judge.

Plaintiff Jet Charter Service, Inc. ("Jet Charter") appeals the district court's grant of defendant Banque Paribas

(Suisse) S.A.'s ("Paribas") motion to dismiss for lack of personal jurisdiction. We affirm.

In July of 1986, Jet Charter filed a multiple count complaint against five defendants, including defendant Paribas. The charges in the complaint arise from Jet Charter's sale of two DC 10-40 aircraft to defendant Progress Aviation, S.A. ("Progress"), a Swiss corporation, in November of 1985. Under the purchase agreement, the sale price of $ 26,473,500 was to be distributed as follows: $ 23,000,000 paid at closing to Boeing, the manufacturer, $ 673,500 paid at closing to Northwest Airlines to release its mechanic's lien for previous repairs done on the aircraft, $ 1,000,000 paid at closing to Jet Charter, and $ 500,000 paid to Jet Charter upon delivery of the aircraft to Progress. The remaining $ 1.3 million of the purchase price was to be retained by Progress to be applied to make repairs necessary to bring the aircraft up to the condition Jet Charter had agreed they would be in at the time of delivery. After the necessary repairs were made, the remaining money would be paid to Jet Charter.

The purchase agreement required Progress to open a letter of credit in favor of Jet Charter to secure Progress's obligation to pay the $ 500,000 upon delivery and the remaining balance of $ 1.3 million. The terms of the letter of credit were to provide that Progress could first draw on the credit to pay for the necessary repairs, and then the remaining balance could be drawn on by Jet Charter. Progress contracted with defendant Paribas, a Swiss bank, to open the letter of credit required by the purchase agreement.

On the day of closing, defendant Jean Caillet, an officer of defendant Paribas, attended the closing in Miami, Florida. When Jet Charter asked whether the letter of credit had been opened, Caillet produced a letter purporting to confirm "the opening of an irrevocable Letter of Credit in the amount of US $ 1,800,000 . . . in accordance with the terms of the Restated Purchase

Agreement of 13th November 1985 between Jet Charter Services, Inc. and Progress Aviation S.A., as amended by the first amendment thereto." R5-129, Exh. B. Jet Charter was not satisfied with this letter, and asked that another letter be drafted by Caillet. Caillet obliged by drafting a letter that represented that Paribas had opened an irrevocable letter of credit in the amount of U.S. $ 1,800,000 in favor of Jet Charter, that an amended letter of credit would be delivered to Jet Charter in Miami, Florida by 5:00 p.m. EST on November 26, 1985 and that the letter of credit would be payable upon presentation to "Banque Paribas in Miami, Florida."[1] The letter further represented that the letter of credit would "be a clean letter of credit other than specifically reciting terms and conditions from that certain restated amended purchase agreement of November 13, 1985 between Jet Charter Services, Inc. and Progress Aviation S.A. as amended by the first amendment thereto.", R5-129, Exh. C.

On the basis of these assurances, Jet Charter assigned its interest in the aircraft to Progress. The aircraft were delivered to Progress as anticipated in the purchase agreement, and a letter of credit was issued, although Jet Charter rejected it as not conforming to the terms of the purchase agreement. Progress had numerous repairs made

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[1] The "Banque Paribas" in Miami, Florida referred to in this letter of assurance is not a branch, subsidiary, nor affiliate of Paribas. It is a branch office of Banque Paribas, a French bank organized under and regulated by the laws of France. The district court held that Banque Paribas and Banque Paribas (Suisse), S.A. are "distant cousins" due to their common ownership by a bank holding company, Compagnie Financiere de Paribas. However, the court found that neither bank exercises any control over the other and each bank maintains separate records, and is governed by different directors and officers. See R2-58, R2-47 (Affidavit of Bernard Chevassùt on behalf of Banque Paribas (Suisse), S.A.).

to the aircraft, and the main dispute in this case revolves around Jet Charter's contention that Progress made more repairs than were authorized by the [*1112] purchase agreement, thus reducing Jet Charter's net profit from the sale in violation of the purchase agreement.

Count One of the complaint alleges that defendant W. Koeck dominates and controls defendants Progress and its related domestic corporation, Progress Aviation (U.S.A.), Inc. (referred to collectively as "the Progress defendants"), and that these defendants breached the purchase agreement by charging repairs that were not required under the purchase agreement against the $ 1.3 million portion of the purchase price. Counts Two and Three allege that the Progress defendants are obligated to repay Jet Charter for certain insurance premiums and for conversion of certain aircraft baggage containers and other equipment. Liberally construed, Count Four alleges that the letters provided by Caillet at the closing comprise a contract between Paribas and Jet Charter, and that Paribas breached that contract by failing to deliver the letter of credit by the stated deadline, and by delivering a letter that did not conform to the terms of the purchase agreement or the terms of the letter contract. Count Five alleges that the Progress defendants and defendant Caillet created a scheme to defraud Jet Charter by falsely leading Jet Charter to believe a letter of credit had been opened so that Jet Charter would complete the sale.

Over two years after the complaint was filed, on September 9, 1988, the district court sua sponte dismissed without prejudice Jet Charter's claims against defendant Koeck because Jet Charter had been unable to serve him with process. R5-121. On December 21, 1988, the court granted defendant Progress's motion to dismiss for failure to effect service of process. In that same order, the district court granted defendant Paribas's motion to dismiss for lack of personal jurisdiction, while denying defendant Caillet's motion to dismiss. R5-134. On April 26, 1989,

the court dismissed the claims against the two remaining defendants, Caillet and Progress Aviation (U.S.A.), Inc., based on joint stipulations for voluntary dismissal without prejudice. R5-144, 145. As a result, the driving issue behind this litigation, whether Progress breached the purchase agreement by making excessive repairs to the aircraft, was never adjudicated by the district court.

In the present case, Jet Charter appeals only the portion of the district court's order of December 21, 1988 dismissing defendant Paribas.[2] At the time it was issued, that order was an interlocutory order because the case was still pending against two other defendants. However, the April 26, 1989 order dismissing the action against the two remaining defendants renders the December 21, 1988 order final. Jet Charter argues on appeal that the district court has personal jurisdiction over defendant Paribas under subsections (1)(a), (1)(b), (1)(f), and (1)(g) of the Florida long-arm statute, Fla.Stat.Ann. § 48.193 (West Supp. 1989). Paribas claims that Jet Charter has failed to provide sufficient facts to prove the existence of jurisdiction under any of these subsections.

Our review of a district court's determination of the existence or non-existence of personal jurisdiction involves evaluating the same documentary evidence relied on by the district court, and therefore we review such determinations de novo. Alexander Proudfoot Co. World Headquarters L.P. v. Thayer, 877 F.2d 912, 916 (11th Cir. 1989). In a diversity action, a federal court may exercise personal jurisdiction over non-resident defendants only to the extent permitted by the forum state's long-arm statute. Oriental Imports & Exports, Inc. v. Maduro & Curiel's Bank,

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[2]At the time it was issued, that order was an interlocutory order because the case was still pending against two other defendants. However, the April 26, 1989 order dismissing the action against the two remaining defendants renders the December 21, 1988 order final.

N.V., 701 F.2d 889, 890 (11th Cir. 1983).

Under Florida law, a plaintiff seeking to subject a nonresident defendant to jurisdiction of the court through show a possibility of jurisdiction. When a defendant raises through affidavits, documents or testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents. Sims v. Sutton, 451 So.2d 931 (Fla. Dist. Ct. App. 1984); accord Norwest Bank Minneapolis, N.A. v. American Centennial Ins. Co., 493 So.2d 101 (Fla.Dist.Ct.App. 1986); [*1113] Polskie Linie Oceaniczne v. Seasafe Transport A/S, 795 F.2d 968 (11th Cir. 1986). Our review of the record in this case reveals no basis for finding that the district court had jurisdiction over defendant Paribas.

Even if the requirements of a state long-arm statute are met, personal jurisdiction cannot be exercised over a defendant that does not have sufficient "minimum contacts" with the forum state to satisfy the requirements of due process.[3] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); accord Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989) (Holding that "mere proof of any one of the several circumstances enumerated in [Florida's long-arm statute] . . . does not automatically satisfy the due process requirement of minimum contacts.").

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[3]With respect to determining whether a state court may assert personal jurisdiction, the requirements of due process apply equally to foreign persons or corporations such as Paribas as to domestic corporations. Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (holding that Constitution prohibited Texas from asserting personal jurisdiction over Colombian corporation where corporation's contacts with Texas were insufficient to satisfy due process clause of Fourteenth Amendment).

The existence of a contractual relationship between a nonresident defendant and a Florida resident is not sufficient in itself to meet the requirements of due process. Burger King, 471 U.S. at 462, 105 S.Ct. at 2174, 85 L.Ed.2d at 528. Due process requires that the defendant's conduct and connection with the forum state be such that the defendant should reasonably anticipate being called into court there. Random, fortuitous or attenuated contacts, or contacts produced through the unilateral activity of a third person are insufficient to reasonably indicate to the defendant that he should anticipate being subject to personal jurisdiction of the forum state's courts. Id. at 475, 105 S.Ct. at 2183, 85 L.Ed.2d at 542.

In support of its argument that the district court has jurisdiction over Paribas, Jet Charter alleges in its complaint and through the affidavit of Gabriel D'La Rotta, President of Jet Charter, the following contacts Paribas had with the state of Florida. Most importantly, Paribas agreed to provide a letter of credit in favor of Jet Charter, a Florida entity, which was an essential part of the aircraft sales transaction. Furthermore, Paribas's bank officer, Caillet, accompanied Progress when Progress first met with D'La Rotta in Miami to propose the sale of the aircraft, and Caillet provided D'La Rotta with a copy of a letter confirming that Paribas had committed to lending Progress the necessary funds for the purchase of the aircraft. When D'La Rotta and his wife subsequently travelled to Geneva, Caillet took them to lunch, and Caillet was present on behalf of Paribas at the closing of the sale in Miami, Florida. Paribas also agreed in the letter assurances given at the closing to deliver the letter of credit to Miami, Florida.

We find these circumstances qualitatively different from those presented in Burger King. In that case, the defendant franchisee entered into a contract which by its terms created a franchise relationship established in Florida, and which called for the franchisee to deliver all

payments of all required fees and all required notices to the franchisor in Miami, Florida. Furthermore, the contract provided that the franchisee's operations would be subject to extensive regulations and inspections ultimately controlled by the Miami headquarters of the franchisor. The Court held that in light of the defendant franchisor's "voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the quality and nature of his relationship to the company in Florida can in no sense be viewed as 'random,' 'fortuitous,' or 'attenuated.'" Burger King, 471 U.S. at 480, 105 S.Ct. at 2186, 85 L.Ed.2d at 528 (citations omitted).

In contrast, the circumstances of the present case are insufficient under the Fourteenth Amendment to establish personal jurisdiction of the Florida courts over defendant Paribas. Paribas's contacts with Florida arose out of its Swiss customer's [*1114] request to open a letter of credit to facilitate this transaction. Although Caillet went to Florida twice on behalf of Paribas, neither visit was essential to Paribas's involvement in the transaction.[4]

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[4]In his affidavit, Caillet explains that Paribas loaned Progress $ 24.5 million to purchase the aircraft from Jet Charter, and that Caillet attended the closing as a loan officer of Paribas to see that the closing went smoothly and that the money and relevant title documents were properly exchanged. R5-125. In response to this explanation, Gabriel D'La Rotta, President of Jet Charter, contends that Caillet's purpose in attending the closing was to deliver the letter of credit required by the purchase agreement. R5-129. Assuming this is true, Paribas was not contractually obligated to Jet Charter to personally deliver the letter of credit at closing, and the letter of credit could have been delivered through some other means. Thus, the fact that Caillet attended the closing, assuming one of the purposes for being there was to

(continued...)

Paribas could have opened the letter of credit, and provided confirmation of its opening, from its office in Geneva. Paribas, unlike the franchisee in Burger King, did not enter into a long-term contractual agreement with Jet Charter.[5] Paribas's long-term contract was with its Swiss customer, Progress. We find that Paribas's brief, non-essential contact with Florida soil, coupled with its involvement in a sales transaction initiated by a third-party, a Swiss company, in which it made no long term contractual commitments to the Florida seller, are insufficient to indicate to Paribas that it should expect to be haled into Florida's courts over disputes that arise out of the sales transaction. Leney v. Plum Grove Bank, 670 F.2d 878, 881 (10th Cir. 1982). See also, Froning & Deppe, Inc. v. Continental Illinois Nat'l Bank & Trust Co., 695 F.2d 289, 292 (7th Cir. 1982) (Routine remittal of commercial instruments such as checks or letters of credit incidentally bound for the forum state insufficient to establish minimum contacts.)

In Leney, an Illinois bank issued a letter of credit, knowing it would be used by its Illinois customer in connection with the sale of real and personal property to a Colorado corporation. When the Colorado beneficiary presented the credit for payment, the Illinois bank refused to honor it. The Colorado beneficiary brought suit in

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[4](...continued)
deliver the letter of credit, is irrelevant for purposes of establishing personal jurisdiction. Further, Paribas had no obligation whatsoever to Jet Charter. Its obligation was to furnish a letter of credit for its customer, Progress.

[5]Assuming Paribas entered into any agreement at all with Jet Charter, it would only be to deliver a conforming letter of credit to Jet Charter in Miami, Florida by a certain time, as evidenced by the letter of assurance signed by Caillet at closing.

federal district court in Colorado against the Illinois bank, alleging wrongful dishonor of the letter of credit. On appeal, the Tenth Circuit found that the mere issuance of a letter of credit which the issuing bank reasonably should have anticipated to be used by a Colorado beneficiary was an insufficient basis upon which to assert personal jurisdiction over the issuing bank. Leney, 670 F.2d at 881. The court reasoned that,

> it is unfair to burden an issuing bank with having to defend litigation over a letter of credit in any state in which the bank could reasonably expect the credit to be used. A letter of credit is 'an engagement by a bank or other person made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit.' U.C.C. § 5-103. By issuing the letter of credit the bank substitutes its credit for that of its customer. The bank's obligation under the letter of credit is independent of the underlying sales contract. . . . . If we were to hold that jurisdiction is proper in Colorado on the facts of the instant case we would have to subject any bank that issues a letter of credit to suit in any state in which the bank could expect the credit to be used. . . .

Id.

Although Paribas's agent set foot in Florida twice in connection with the transaction, and gave assurances that the bank would provide the necessary letter of credit, Jet Charter's claim against Paribas in the present case is essentially the same as the Colorado beneficiary's claim against [*1115] the Illinois bank in Leney. Jet Charter claims that Paribas failed to issue a letter of credit that conformed to the required terms, while the Colorado

beneficiary claimed that the Illinois bank failed to honor the letter of credit according to its terms. As in Leney, Paribas's contact with the forum state was initiated by its customer, a nonresident of the forum state. Paribas, like the Illinois bank, knew that the letter of credit would be used by a resident of the forum state. Despite Jet Charter's insistence that the confirmation of the opening of a letter of credit was a material requirement for the closing, there is no evidence that Paribas contractually obligated itself to send an agent to the closing, or to send an agent during the preliminary negotiations. Paribas, for its own reasons, decided to send Caillet to Florida. Nevertheless, Paribas's participation in the deal would not have been materially different if it had used the mails or a correspondent bank to confirm the issuance of the letter of credit. Under these circumstances, the requirements of due process are not met for the purposes of asserting personal jurisdiction over Paribas in Florida courts.

For the foregoing reasons, we find that Jet Charter has failed to sustain its burden of proving that personal jurisdiction over defendant Paribas exists in Florida.[6] The district court order dismissing Jet Charter's claims against defendant Paribas for lack of personal jurisdiction is therefore AFFIRMED.

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[6]Having determined that the exertion of personal jurisdiction over defendant Paribas in this case would violate due process, we need not consider Jet Charter's arguments that the district court erred in holding that the requirements of Florida's long-arm statute are not met in this case. Burger King, 471 U.S. at 462, 105 S.Ct. at 2174, 85 L.Ed.2d at 528; see also Venetian Salami, 554 So.2d 499 (Fla. 1989).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 89-5516

JET CHARTER SERVICES, INC.,

Plaintiff-Appellant,

versus,

W. KOECK, PROGRESS AVIATION (U.S.A.), INC., PROGRESS AVIATION, S.A., JEAN CAILLET,

Defendants,

BANQUE PARIBAS (SUISSE), S.A.,

Defendant-Appellee.

Appeal from the United States District Court for the

Southern District of Florida

ON PETITION(S) FOR REHEARING
(October 31, 1990)

BEFORE: CLARK, Circuit Judge, MORGAN and RONEY*, Senior Circuit Judge

PER CURIAM:

The petition(s) for rehearing filed by appellant, Jet Charter Service, Inc., is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 89-5516

JET CHARTER SERVICES, INC.,

Plaintiff-Appellant,

versus,

W. KOECK, PROGRESS AVIATION (U.S.A.), INC., PROGRESS AVIATION, S.A., JEAN CAILLET,

Defendants,

BANQUE PARIBAS (SUISSE), S.A.,

Defendant-Appellee.

Appeal from the United States District Court for the

Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 3, 1990, 11 Cir., 1990, 907 F.2d 1110).
(October 31, 1990)

Before CLARK, Circuit Judge, MORGAN AND RONEY*, Senior Circuit Judge

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-154-CIV-NESBITT

JET CHARTER SERVICES, INC.,

Plaintiff,

vs.

PROGRESS AVIATION (U.S.A), INC., et. al,

ORDER ON PENDING MOTIONS

Defendants.
_____/

The Court has reviewed the various motions filed by the parties and after due consideration, it is hereby ORDERED and ADJUDGED AS FOLLOWS.

1. Defendant Progress Aviation, S.A.'s Motion to Dismiss for Insufficiency of Service, filed on October 11, 1988 is GRANTED. Plaintiff failed to file a memorandum in opposition to the motion, and it is evident from the court file that this defendant has not yet been served, even though the complaint was filed almost three years ago. The court has been generous in granting extensions of time serve the foreign defendants and despite repeated attempts, Plaintiff has simply failed to serve the correct corporation.

2. Plaintiff's "Reply Memorandum in Support of Jurisdiction" filed on November 14, 1988 is an un authorized reply and shall be STRICKEN from the court file.

3. Defendants Banque Paribas (Suisse) ("the Bank") and Jean Caillet's Motion to Dismiss filed on

October 7, 1988 is GRANTED in part. Plaintiff has not alleged sufficient facts to support in personam jurisdiction over the Bank under Florida's long arm statute. Plaintiff contends that this court has jurisdiction over the Bank pursuant to Fla. Stat § 48,193(1)(f) and (g). Count four of the complaint alleges that the Bank breached an agreement to provide a letter of credit; however, neither the complaint nor the affidavit in opposition to the motion to dismiss supports the contention that the Bank was engaged in service activities within the State of Florida, as required by § 48,193(f), or that the alleged contract required by § 48,193(1)(g). Therefore, the Bank shall be DISMISSED as a defendant.

Count Five of the complaint alleges that Caillet made fraudulent misrepresentations to plaintiff during meetings in Miami, Florida. Because § 48,193(1)(b) provides for jurisdiction over any person who commits a tortious act within the state, and because the court must accept the allegations in plaintiff's affidavit as true, Caillet cannot be dismissed for lack of in personam jurisdiction. The issue of Caillet's liability as an agent or the Bank may be the subject of a future motion.

4. This case remains set for trial on the June 19, 1988 trial calendar, with only two defendants remaining.

DONE and ORDERED in chambers, Miami, Florida, this 16 day of December, 1988.

_____
LENORE C. NESBITT
UNITED STATES DISTRICT JUDGE

Copies furnished:
R. Lawrence Bonner, Esq.
Stanley J. Bartel, Esq.
David Patterson, Esq.
Francisco J. Pinto-Torras, Esq.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF FLORIDA (MIAMI DIVISION)

CASE NO. 86-154-CIV-NESBITT

JET CHARTER SERVICES, INC.,

Plaintiff,

vs.

PROGRESS AVIATION (U.S.A),
INC., et. al,

Defendants.
_____/

JOINT STIPULATION FOR VOLUNTARY DISMISSAL WITH PREJUDICE AS TO PLAINTIFF'S COMPLAINT AGAINST DEFENDANT PROGRESS AVIATION, U.S.A. AND DEFENDANT PROGRESS AVIATION U.S.A.'S COUNTERCLAIM AGAINST PLAINTIFF JET CHARTER

Plaintiff Jet Charter Service, Inc. and defendant, Progress Aviation, U.S.A., Inc., by and through their undersigned counsel and pursuant to Rule 41, Fed.R.Civ.P., hereby voluntarily dismiss with prejudice any and all claims which either party may have or had against one another relating to the Complaint filed on July 16, 1986 and the Counterclaim filed on August 10, 1987 with each party to bear its own attorneys' fees and costs and jointly move for entry of the attached order.

Respectfully submitted,

Stanley J. Bartel, P.A. Greer, Homer et. al.

ORDER ON JOINT STIPULATION FOR
VOLUNTARY DISMISSAL WITH PREJUDICE

THIS MATTER came before the Court on the preceding Stipulation for Voluntary Dismissal With Prejudice between plaintiff Jet Charter Service, Inc. and defendant Progress Aviation, U.S.A., Inc., and the Court having reviewed the foregoing joint stipulation and being advised in the premises, it is

ORDERED:

1. Plaintiff's complaint against defendant Progress Aviation, U.S.A., Inc. is hereby dismissed with prejudice. Said dismissal is without prejudice as to the claims of Jet Charter Service, Inc., if any, against other defendants in this action.

2. Defendant Progress Aviation U.S.A., Inc.'s counterclaim against Jet Charter Service, Inc. is hereby dismissed with prejudice.

3. Plaintiff and defendant Progress Aviation, U.S.A., Inc. shall bear its own costs and attorneys fees incurred herein.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 26 day of April , 1989.

U.S. DISTRICT COURT JUDGE

Copies furnished:

R. Lawrence Bonner, Esq.
Stanley J. Bartel, Esq.
David Patterson, Esq.
Francisco J. Pinto-Torres, Esq.

3839b

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JET CHARTER SERVICES, INC., No. 86-154-CIV-N

Plaintiff,

vs.

PROGRESS AVIATION (U.S.A), INC., et. al,

ORDER ON PENDING MOTIONS

Defendants.

_____/

STIPULATION ON DISPOSITION OF INTERPLED MONIES

Plaintiff Jet Charter Service, In., defendant Progress Aviation, U.S.A., Inc., and defendant Jean Caillet by and through their undersigned counsel hereby agree, consent, and stipulate that the $ 3,145,36 plus accrued interest, if any, which has been interpled in this action pursuant to this COurt's Order dated February 9, 1988 shall be released from the Greer, Homer & Bonner, P.A., escrow account and disbursed to Progress Aviation, S.A. Greer, Homer & Bonner, P.A. is hereby released from any further escrow responsibilities for these monies.

Respectfully submitted,

Stanley J. Bartel, P.A.
by:
Stanley J. Bartel

Greer, Homer et. al.
R. Lawrence Bonner

Breed, Abbott & Morgan
Attorneys for Jean Caillet
153 East 53rd Street
New York, Now York 10022
(212) 888-0800
by: David S. Patterson

ORDER ON STIPULATION ON
DISPOSITION OF INTERPLED MONIES

THIS MATTER came before the Court on the preceding Stipulation on Disposition of interpled Monies between plaintiff Jet Charter Service, In., defendant Progress Aviation, U.S.A., Inc., and defendant Jean Caillet, and the COurt having reviewed the foregoing stipulation and being advised in the premises, it is

ORDERED:

1. The §3,145.36, plus accrued interest, if any, which has been interpled in this action pursuant to this COurt's February 9, 1988 Order shall be released from the Greer, Homer & Bonner, P.A. escrow account and disbursed to Progress Aviation, S.A.

2. Greer, Homer & Bonner, P.A. is hereby released from any further escrow responsibilities for these monies.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this ____ day of _____, 1989.

_____
U.S DISTRICT COURT JUDGE

Copies Furnished:

R. Lawrence Bonner, Esq.
Stanley J. Bartel, Esq.
David Patterson, Esq.
Francisco J. Pinto-Torras, Esq.

3839b

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF FLORIDA (MIAMI DIVISION)

CASE NO. 86-154-CIV-NESBITT

JET CHARTER SERVICES, INC.,

Plaintiff,

vs.

PROGRESS AVIATION (U.S.A),
INC., et. al,

Defendants.
_____/

JOINT STIPULATION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE AS TO PLAINTIFF'S COMPLAINT AGAINST DEFENDANT JEAN CAILLET

Plaintiff Jet Charter Service, Inc. and defendant, Jean Caillet, by and through their undersigned counsel and pursuant to Rule 41, Fed.R.Civ.P., hereby stipulate to the voluntary dismissal without prejudice of any and all claims which plaintiff has asserted against defendant, Jean Caillet in this action, with each party to bear its own attorneys' fees and costs and jointly move for entry of the attached order.

Respectfully submitted,

Stanley J. Bartel, P.A.
Attorneys for Jet Charter
2150 Courthouse Tower
44 West Flagler Street
Miami, Florida, 33130
(305) 358-7177

Stanley J. Bartel

Breed, Abbot & Morgan
Attorneys for Jean Caillet
153 East 53rd Street
New York, New York 10022
(212) 888-0800

David S. Patterson

ORDER ON JOINT STIPULATION FOR
VOLUNTARY DISMISSAL WITHOUT PREJUDICE

THIS MATTER came before the Court on the preceding Stipulation for Voluntary Dismissal Without Prejudice between plaintiff Jet Charter Service, Inc. and defendant Jean Caillet, and the Court having reviewed the foregoing joint stipulation and being advised in the premises, it is

ORDERED:

1. Plaintiff's complaint against defendant Jean Caillet is hereby dismissed without prejudice.
2. Plaintiff and defendant Jean Caillet shall bear its own costs and attorneys fees incurred herein.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 26 day of April, 1989.

U.S. DISTRICT COURT JUDGE

Copies furnished:

R. Lawrence Bonner, Esq.
Stanley J. Bartel, Esq.
David Patterson, Esq.
Francisco J. Pinto-Torres, Esq.

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U.S. Constitution, amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES 1989
TITLE VI CIVIL PRACTICE AND PROCEDURE
CHAPTER 48 PROCESS AND SERVICE OF PROCESS
Fla. Stat. § 48.193 (1989)

48.193 Acts subjecting person to jurisdiction of courts of state

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

* * *

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.